Supreme Court, U.S.
FILED
SEP 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1597

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, by and through her next friend, DR. DANIEL N. MERGENS, *et al.*,
Respondents,

UNITED STATES OF AMERICA,
Respondent,

KENDRA K. KELLISON, etc., by and through her next of friends, VICTOR KRAATZ and LINDA KRAATZ, *et al.*,
Respondents,

MATT SCHULZ, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote goodwill and harmonious relations in the community, to combat all forms of religious prejudice and

discrimination, and to defend the rights and sanctity of each human life. The League has obtained written permission to file this brief from the counsel of record for the parties in this case. These letters have been filed with the Clerk of Court.

SUMMARY OF ARGUMENT

The Equal Access Act (20 U.S.C. §§4071-74 (1984)) (hereinafter the EAA) prohibits public secondary schools receiving federal funds from barring groups wishing to use school-provided limited open forums based on the religious or political content of the proposed group's speech. By allowing noncurriculum related student groups to use school facilities after school hours, Westside School District has created a limited open forum and, therefore, is subject to the EAA's provisions. Westside School District's policy, which prevents groups from using the limited open forum provided by the school if they are affiliated with a political or religious group, violates the EAA.

Any challenge to the constitutionality of the EAA based on the First Amendment's Establishment Clause must be rejected because the EAA satisfies all three prongs of the test enunciated by the Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Even if the Court rules that the Equal Access Act is unconstitutional, or that it does not apply in this case, religiously-oriented groups like the Bible club proposed by Ms. Mergens (hereinafter Bible Club) are constitutionally entitled to use a limited open forum provided by a secondary school under the standards set forth by the Court in *Widmar v. Vincent,* 454 U.S. 263 (1981). *Widmar* prohibits educational institutions from discriminating against groups which wish to use a limited open forum provided by schools based on the religious affiliation of the proposed group. A qualifying group may only be prevented from using a limited open forum if denying access to the group is the least restrictive means of furthering a compelling state interest. Because Westside

School District has not demonstrated that any compelling state interest is furthered by its policy banning religious groups and because, even if the school district has offered a compelling concern, it has not shown that its policy is the least restrictive means of accomplishing this goal, the school district's policy is unconstitutional.

ARGUMENT

I. WESTSIDE SCHOOL DISTRICT'S POLICY OF PREVENTING RELIGIOUSLY-AFFILIATED GROUPS FROM USING THE LIMITED OPEN FORUM PROVIDED BY THE HIGH SCHOOL VIOLATES THE EQUAL ACCESS ACT.

The EAA states in pertinent part:

> (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> (b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

Webster's Ninth New Collegiate Dictionary defines the word "curriculum" as: (1) the courses offered by an educational institution; (2) a set of courses constituting an area of specialization. If the statutory language is unambiguous, and if there is no clearly expressed legislative intent to the contrary, that language must ordinarily be considered to be conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). Nothing in

the EAA's language or legislative history expresses any Congressional intention that "noncurriculum related student group" be given anything other than its plain and ordinarily accepted meaning. Therefore, it is clear that student groups engaging in activities which are not directly related to courses offered by a secondary school are "noncurriculum related student groups" which, under the EAA, may not be excluded from a limited open forum because of the religious content of the group's speech.

Several of the approximately 30 student clubs which meet at Westside High School are "noncurriculum related student groups". For example:

— Subsurfers, a club designed for students interested in learning about skin and scuba diving, permits nonstudents to participate so they can obtain scuba certification. Because membership and participation in Subsurfers is not limited to the student body at Westside High School, and because Subsurfers is not related in any way to a course offered by the school, the inescapable conclusion must be that Subsurfers is a noncurriculum related student group.

— Interact is a service-oriented club related to Rotary International. Rotarians (adult members of the general public) occasionally attend Interact meetings. Membership in Interact is entirely voluntary; members receive no class credit for participating. Consequently, Interact — a group which has close connections with a national community service organization and is absolutely unrelated to any course offered at the high school — is also a noncurriculum related student group.

— The Chess Club is not affiliated with or related to any class taught at Westside High School. The legislative history of the EAA clearly indicates that a chess club is a "noncurriculum related student group" which falls within the coverage of the EAA. *See* 130 Cong. Rec. S8342 (daily ed. June 27, 1984). Therefore, because the Chess Club is not

directly related to any course offered by the high school, it is also a noncurriculum related student group.

Because Westside School District has authorized Subsurfers, Interact and the Chess Club — three noncurriculum related student groups — to use school property after regular school hours, it has created a limited open forum which is covered by the provisions of the EAA. Consequently, since the EAA explicitly forbids secondary schools which receive federal funds from discriminating against or denying access to a student group based on the religious content of the group's speech, Westside School District's refusal to allow the Bible Club to use the limited open forum provided by the school because of the group's religious speech violates the EAA.

II. THE EQUAL ACCESS ACT DOES NOT VIOLATE THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE.

When determining whether a statute or regulation violates the First Amendment's Establishment Clause, the constitutional analysis is controlled by the three-pronged test set forth by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To satisfy constitutional standards, the statute in question must:

(1) Have primarily a secular purpose;

(2) Have a primary effect which neither advances nor inhibits religion; and

(3) Not foster excessive government entanglement with religion.

403 U.S. at 612-13.

The EAA satisfies all three prongs of the *Lemon* test. First, the purpose of any type of open or limited open forum is to foster the free exchange of ideas. *Widmar v. Vincent*, 454 U.S. 263, 272 n. 10 (1981). This is a perfectly legitimate and

laudable secular purpose. The fact that a forum is made available to all qualifying groups — regardless of a group's religious, political or secular orientation — effectively refutes any allegation that the statute was improperly designed to further religious concerns. Even though *Widmar* involved a university rather than a secondary school, the observation made by the Court in that case is equally applicable here:

> [B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

454 U.S. 263, 272 n. 10.

In summary, because the EAA has a secular purpose — promoting the free exchange of ideas — the EAA satisfies the first prong of the *Lemon* test.

The EAA also satisfies the second prong of the *Lemon* test, which bars regulations having a primary effect of either advancing or inhibiting religion. The EAA clearly does not either advance or inhibit religious interests. Merely incidental religious benefits do not violate the Establishment Clause. 454 U.S. at 273. Because allowing the Bible Club to use the limited open forum provided by the school district would grant the club no special treatment or privileges denied to the other clubs eligible to use the forum, any benefits enjoyed by the Bible Club would be merely incidental and, therefore, would not violate the second prong of the *Lemon* test.

The school district argues that the EAA impermissibly advances religion because high school students will view the district's provision of a limited open forum at the school as a state endorsement or sanction of the views expressed therein. This argument lacks merit.

First, Westside School District's creation of a limited open forum for use by student groups makes it very similar to other

organizations which provide forums for public commentary. A newspaper which publishes its readers' opinions on its editorial page cannot fairly be accused of endorsing the viewpoints expressed therein. Similarly, broadcast stations which open their airwaves for public commentary are not charged with sharing the views expressed. Certainly, no one attributes to the state the views of people who take advantage of state-provided opportunities to exercise their First Amendment rights by picketing or marching on the streets, or by making their voices heard at legislative hearings. In none of these instances can organizations which provide a public forum fairly be accused of endorsing the ideas of those who choose to avail themselves of the opportunity for public expression.

Here, however, Westside School District argues that, if the district allows the Bible Club to meet on school premises, students will consider this to be a school sanction of religion. Generally, people do not attribute reader opinions on the editorial page in the newspaper, or listener comments on the airwaves, or those made before governmental bodies, to the respective organizations which provide these forums for public expression. It is reasonable to conclude that students will not assume that a school district — merely by providing a forum for public expression — endorses the views expressed therein.

It is also important to remember that the forum provided by the school district is open to all qualifying groups, both religious and nonreligious, political and nonpolitical. It is difficult to fathom how a school district can be charged with supporting the viewpoints of a group using a limited open forum when it affords other groups which may advocate an inconsistent — possibly even diametrically opposite — viewpoint the same opportunity for free expression in the same forum.

In summary, because the EAA does not impermissibly advance religion, it complies with the second prong of the *Lemon* test.

The EAA also satisfies the third prong of the *Lemon* test, which requires any regulation involving the state in an excessive entanglement with religion to be stricken. The EAA strives to avoid entanglement by making a limited open forum available to all qualifying groups — regardless of the religious or political agenda of the group using the forum. The Court observed in *Widmar* that an educational institution which attempts to enforce a policy hostile to religion becomes more entangled in religion than one which grants access to all qualifying groups, notwithstanding the religious nature of their speech. *Widmar*, 454 U.S. at 272, n. 11. Therefore, because the EAA was designed in part to avoid entanglement between secondary schools and the state, any claim that the EAA violates the Establishment Clause by excessively entangling the state in religion must be rejected.

Because the EAA does not involve the state in an excessive government entanglement in religion, it satisfies the third prong of the *Lemon* test.

The three-pronged test enunciated by the Court in *Lemon* controls the constitutional analysis of cases involving claimed violations of the Establishment Clause. Because the EAA satisfies all three prongs of the *Lemon* test, the EAA does not violate the Establishment Clause.

III. EVEN IF THE EQUAL ACCESS ACT IS UNCONSTITUTIONAL OR DOES NOT APPLY, ALLOWING THE BIBLE CLUB TO MEET WOULD SATISFY CONSTITUTIONAL STANDARDS.

Even if the Court decides that the Equal Access Act is unconstitutional, or that it does not apply in this case, allowing the Bible Club to use the limited open forum

provided at Westside High School comports with constitutional standards.

Local school boards are generally afforded broad discretion in managing school affairs. *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). However, the Court, while noting that states and local school boards have considerable discretion in operating public schools, has recently observed:

> At the same time...we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.

Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 864 (1982).

The importance of protecting constitutional rights inside the school setting has long been recognized by the Court. In *Shelton v. Tucker,* 364 U.S. 479, 487 (1960), the Court stated that it was more important to vigilantly safeguard constitutional freedoms in the schools than anyplace else. In *Tinker v. Des Moines Community School District,* 393 U.S. 503, 512 (1969), the Court described the classroom as a "marketplace of ideas" within which the free expression of various viewpoints was to be encouraged. Students have a right to express their opinions if they can do so without substantially interfering with the requirements of school discipline and without violating the rights of others. *Burnside v. Byars,* 363 F.2d 744, 749 (1966). In fact, it is clear that neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. 393 U.S. at 506.

Religious worship and discussion are forms of speech and association protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S.

640, 647 (1981). Nothing in the Establishment Clause requires the state to suppress a person's speech merely because the content of the speech is religious in character. *Bender v. Williamsport Area School District,* 475 U.S. 534, 552 (1986) (Burger, C. J., dissenting). The Court has expressly rejected the argument that the Establishment Clause requires schools to ban groups which would otherwise qualify from using an open forum merely because of the religious content of their proposed speech. *Widmar*, 454 U.S. at 270-71. In short, it is clear that religious speech and expression enjoy just as much First Amendment protection as any other form of speech.

In order to justify discriminatory exclusion from a public forum based on the religious content of a group's speech, the state (or any entity acting on its behalf) must show that the regulation is both absolutely necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown,* 447 U.S. 455, 461-62, 465 (1980); 454 U.S. at 270.

In *Widmar,* the Court held that a university had, by adopting a policy of opening campus facilities for use by student groups, created a limited open forum (the forum was a limited open, rather than a public, forum because it was available for use only by student groups). Once the school created a limited open forum, it was permitted to exclude a qualifying group from the forum on the basis of the content of the group's speech only if it could prove that the prohibition was necessary to further a compelling state interest and was the least restrictive means of accomplishing this. 454 U.S. at 267-68. In *Widmar,* the university failed to demonstrate that excluding a religiously-oriented group from its limited open forum was the least restrictive means of achieving a compelling state interest.

Bender involved a fact situation virtually identical to the one in *Widmar* except for one minor difference: the

educational institution seeking to prohibit students from using a limited open forum to meet for religious purposes was a high school — not a university. Although the majority in *Bender* avoided addressing the merits of that case by disposing of the appeal on procedural grounds, the four dissenting justices agreed that a high school which created a limited open forum was to be held to the same constitutional standard which was applied to a university in *Widmar*; a content-based exclusion of a group from a limited open forum was constitutionally permissible only if the school could show that the restriction was necessary to further a compelling state interest and was narrowly drawn to achieve that end. 475 U.S. at 553 (Burger, C. J., dissenting); 475 U.S. at 555 (Powell, J., dissenting).

The present case is analogous to *Bender.* In both instances, a school district which made a limited open forum available to other student groups unconstitutionally denied a student group use of the forum because of the religious content of the proposed group's speech. In *Bender,* the Court did not reach the merits; in this case, the Court has an opportunity to make a decision on the merits. Because Westside School District has failed to offer a compelling justification for banning the Bible Club and has not demonstrated that banning the Bible Club is the least restrictive means of advancing a compelling interest, the Court should rule that Westside School District has unconstitutionally prevented Mergens and her companions from exercising their right to meet in the limited open forum provided by Westside High School.

Westside School District has offered no compelling reason for denying access to the Bible Club. The high school defends its abridgement of Mergens' and her companions' constitutional rights by alleging that high school students will view a policy which permits the Bible Club to meet on school property as a state endorsement of religion. This is merely speculation. The school district erroneously considers high school age students to be incapable of distinguishing between

activity occurring on school grounds which is sanctioned by the school and activity occurring on school grounds which is not school-sanctioned.

Young adults of high school age are held responsible for their behavior and performance at school, at work, while operating a motor vehicle, and while engaging in other social activities. When young adults fail to conduct themselves in a mature manner, they are made to bear the consequences: they are usually subject to sanctions or punishment whenever they fail to meet behavioral or performance expectations. In short, it defies logic to assume that young adults — who are required to bear adult-like responsibility every day — are incapable of distinguishing between school-sanctioned and nonschool-sanctioned activity occurring on school grounds after school hours.

Westside School District has also either neglected to consider, or has consciously disregarded, the possibility of choosing a less restrictive means of alleviating its concerns. Westside High School could publicize the fact that it does not necessarily endorse or agree with the views expressed by the groups using the limited open forum provided by the school by communicating this to students via school mail, school newspaper, public address announcement, poster, or whatever other method may be appropriate. The school district has chosen not to do this.

In summary, even if the Equal Access Act is ruled by the Court to be unconstitutional or not to apply in this case, Westside School District's denial of the Bible Club's request to use the limited open forum created by the school district is unconstitutional because the state has failed to demonstrate either that there is a compelling justification which mandates such a denial, or that a total ban of the Bible Club is the least restrictive means of furthering a compelling state interest.

CONCLUSION

When considering whether allowing a Bible club to use school property during noninstructional hours violates the Establishment Clause, the Court should recall that it has long recognized the importance of accommodating the religious choices of the nation's citizenry. In *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court pointed out that the First Amendment:

> [R]equires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

In another early frequently-cited case, *Zorach v. Clausen,* 343 U.S. 306, 314 (1952), the Court said:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

More recently, Justice Brennan, concurring in the judgment in *McDaniel v. Patti,* 435 U.S. 618, 638 (1978), noted that:

> [T]he limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom

to develop and preach religious ideas and practices is protected by the Free Exercise Clause.

Allowing religious groups an equal opportunity to use a forum made available to other groups confers upon them no unique benefit; rather, it merely permits the state to accommodate those who wish to exercise their religious freedom rights. The Court should affirm the decision of the Eighth Circuit Court of Appeals and rule that the Bible Club is constitutionally entitled to use the limited open forum at Westside High School.

Respectfully submitted,

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September 27, 1989